INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	15

CITATIONS

Cases:

Bass v. *United States*, 324 F. 2d 168	6, 7
Blair v. *United States*, 250 U.S. 273	11
Blumenthal v. *United States*, 332 U.S. 539	13
Brooks v. *United States*, 267 U.S. 432	8–9
Caminetti v. *United States*, 242 U.S. 470	9
Champion v. *Ames*, 188 U.S. 321	9
Costello v. *United States*, 365 U.S. 265	10, 12
Costello v. *United States*, 255 F. 2d 389, certiorari denied, 358 U.S. 830	12
Delli Paoli v. *United States*, 352 U.S. 232	12
Gorin v. *United States*, 313 F. 2d 641, certiorari denied, 374 U.S. 829	12
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241	9
Hemans v. *United States*, 163 F. 2d 228, certiorari denied, 332 U.S. 801	8
Hoke v. *United States*, 227 U.S. 308	9
Ingram v. *United States*, 360 U.S. 672	7
Lambert v. *California*, 355 U.S. 225	8
Opper v. *United States*, 348 U.S. 84	12
Papalia v. *United States*, 243 F. 2d 437	15

Cases—Continued

	Page
Shevlin-Carpenter Co. v. *Minnesota*, 218 U.S. 57	7
Tatum v. *United States*, 249 F. 2d 129, certiorari denied, 356 U.S. 943	15
United States v. *Barrow*, 212 F. Supp. 837	10
United States v. *Bertucci*, 333 F. 2d 292, certiorari denied, 379 U.S. 829	14
United States v. *Caron*, 266 F. 2d 49	12
United States v. *Kelly*, 349 F. 2d 720, certiorari denied, 384 U.S. 947	15
United States v. *Riccardi*, 174 F. 2d 883, certiorari denied, 337 U.S. 941	15
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	14
United States v. *Zambito*, 315 F. 2d 266, certiorari denied, 373 U.S. 924	6
United States v. *Zizzo*, 338 F. 2d 577, certiorari denied, 381 U.S. 915	6, 7
Wong Sun v. *United States*, 371 U.S. 471	10
Yarborough v. *United States*, 230 F. 2d 56, certiorari denied, 351 U.S. 969	7–8
Statutes and rule:	
18 U.S.C. 371	7
18 U.S.C. 1952	2, 5, 6, 7
Rule 14, F.R. Crim. P	12
Miscellaneous:	
2 Underhill, *Criminal Evidence*, § 500 (5th ed., 1956)	15
3 Wharton, *Criminal Evidence*, § 852 (12th ed., 1955 and 1966 Supp.)	15
3 Wigmore, *Evidence*, §§ 747, 754–755 (3rd ed., 1940)	15

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 609

GEORGE BARROW, A/K/A "SKINNY BARRETT", FRED DIPATRIZIO, A/K/A "FLIVVIE THE FISH", A/K/A "WHISPERS", JOSEPH MATTIA, A/K/A "GASSY", AND PASQUALE PILLO, A/K/A "HUSKY", PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 31–40) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on July 18, 1966. A petition for rehearing was denied on August 30, 1966. The petition for a writ of certiorari was filed on September 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established that petitioners had conspired to violate 18 U.S.C. 1952.

2. If so, whether the statute is constitutional as applied.

3. Whether the testimony of certain witnesses should have been suppressed as the fruit of an illegal entry.

4. Whether petitioners were prejudiced by a joint trial involving fourteen defendants.

5. Whether the trial court erred in permitting the government to use grand jury testimony for purposes of refreshing recollection and as past recollection recorded.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * offenses in violation of

the laws of the State in which they are committed * * *.

STATEMENT

Petitioners, with eight co-defendants, were convicted by a jury in the United States District Court for the Eastern District of Pennsylvania on one or more counts of a 26-count indictment (A. App. 23a–57a [1]) charging interstate travel with the intent to facilitate an illegal gambling operation, in violation of 18 U.S.C. 1952 (counts 2–26), and conspiracy to violate such provision (count 1).[2] Petitioners were sentenced to imprisonment for varying periods as follows: Barrow to two years on count 1; Pillo to two

---

[1] "A. App." refers to the Appendix for Appellants in the court of appeals; "G. App." refers to the Appendix for Appellee in that court.

[2] The indictment charged the four petitioners and eleven co-defendants. The trial court granted a severance to defendant Alfonso Comito prior to trial (A. App. 7a) and, at the end of the government's case, entered judgment of acquittal on all counts as to defendant James Gatto and on count 2 as to the defendants therein named (A. App. 10a). The jury acquitted defendant Rocco Grassi on all counts (A. App. 11a). As to petitioners, the jury returned verdicts as follows (A. App. 11a–12a):

Barrow: Guilty on counts 1, 3–11, 15–26; not guilty on 12–14.

Pillo: Guilty on counts 1, 3–11, 15–26; not guilty on 12–14.

DiPatrizio: Guilty on counts 1, 9–11.

Mattia: Guilty on count 1, not guilty on 13.

The trial court granted a new trial to petitioner Barrow on counts 3–11 and 15–26 and to petitioner Pillo on counts 5–11 and 15–26, since the court had inadvertently omitted a necessary jury instruction as to those counts (A. App. 510a, 535a–536a).

years on counts 1, 3 and 4, to run concurrently; DiPatrizio to six months on counts 1, 9, 10 and 11, to run concurrently; and Mattia to six months on count 1 (A. App. 20a–21a, 541a–544a).[3] On appeal, petitioners' convictions were unanimously affirmed (Pet. App. A 31–40).

The evidence at trial showed that a large scale dice game was being conducted at 237 Cherry Street in Reading, Pennsylvania from early 1960 to late June 1961 and from November 17, 1961 to January 20, 1962,[4] in violation of State law (*e.g.*, A. App. 247a–249a, 344a–350a; 389a; G. App. 126b–146b). There were some 40 to 50 persons employed in the operation of the game as supervisors, "dealers," "laddermen," "doormen," "luggers" and in other capacities (A. App. 348a–350a; G. App. 132b, 140b–142b, 145b, 160b–163b, 184b–185b, 220b). Petitioners worked in varying jobs. Petitioner Barrow was characterized as "[t]he fellow that run the place" (G. App. 220b). He hired people (G. App. 220b–224b, 226b–227b) and "kept the game straight and settled any disputes or arguments" (A. App. 256a–257a). When the doorman was doubtful whether a new customer should be admitted to the game, petitioner Barrow made the decision (G. App. 231b–232b). At the close of each gaming session, Barrow would pick up the money and take it to the office (A. App. 257a, 261a). Petitioners

[3] Higher sentences were originally entered on August 28, 1964 (A. App. 16a–17a) but reduced as indicated pursuant to motion on November 18, 1964.

[4] The gambling operation had been closed down for physical repairs in June 1961 and reopened in November 1961 (A. App. 248a).

DiPatrizio, Mattia and Pillo were employed in the dice game as "laddermen" (A. App. 257a–258a, 264a, 294a, 296a, 353a, 394a–396a; G. App. 179b–180b). Petitioner Pillo lent money to players (A. App. 409a). He also helped Barrow pick up the money after the games and take it to the office (A. App. 258a, 261a).

Nine of the defendants, including petitioners DiPatrizio, Mattia and Pillo, travelled from New Jersey to Reading, Pennsylvania either to work in the game or to transport players to and from the game (A. App. 112a–113a, 119a–124a, 190a, 195a–196a, 222a–223a, 226a; G. App. 159b, 181b–183b, 209b–212b, 233b–246b). Persons from New Jersey regularly played in the dice game (A. App. 285a–286a, 344a, 389a; G. App. 126b) and, at various times, the doorman would loudly announce the departure of the "luggers" cars for Philadelphia and New Jersey (A. App. 260a). During the few weeks preceding the January 20, 1962, FBI raid, players driving automobiles with New Jersey license plates were instructed to park their cars in a concealed location some distance from the game and not in the customary parking lots adjacent to the building (A. App. 289a, 364a, 392a).

ARGUMENT

1. Petitioners' contentions that the evidence does not establish a violation of 18 U.S.C. 1952 or, as a consequence, a conspiracy to violate such provision (Pet. 3, 12–16, 18–21) is refuted by the facts set forth above considered in light of the statutory language. The statute, on its face, applies to whoever travels in interstate commerce with the intent to carry on or

facilitate the carrying on of a gambling operation in violation of State law and thereafter performs or attempts to perform facilitating acts. All of the present petitioners were convicted of conspiring to violate the statute. Two of them, petitioners Pillo and DiPatrizio, were also convicted of substantive violations. Some of the defendants worked as "luggers" to transport New Jersey players to the game in Reading, Pennsylvania. Even under petitioners' narrow construction of the provision, this activity in which the travel itself significantly contributed to the conduct of the illegal operation plainly violated the statute. See *United States* v. *Zambito,* 315 F. 2d 266 (C.A. 4), certiorari denied, 373 U.S. 924. Other defendants, including petitioners DiPatrizio, Mattia and Pillo, commuted from New Jersey to Reading, Pennsylvania, to work in the operation. As held in *United States* v. *Zizzo,* 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915 and *Bass* v. *United States,* 324 F. 2d 168 (C.A. 8), this activity likewise falls within the express language of the statute, which requires only that the person travelling intend to facilitate the unlawful activity and either actually facilitate it or attempt to do so. Section 1952 does not require that the travel be an integral part of the illegal operation or that the traveler be an essential employee. Since petitioners DiPatrizio, Mattia and Pillo obviously knew that they were travelling interstate for the purpose of facilitating the illegal dice game, they were properly chargeable under the statute.

Petitioner Barrow was the operator of the illegal gambling operation. Although he did not himself

engage in any interstate travel, he may be held to account under 18 U.S.C. 1952, along with the interstate travellers themselves, as a co-conspirator (18 U.S.C. 371). See *United States* v. *Zizzo, supra*, *Bass* v. *United States, supra*. That the jury was warranted in finding, under proper instructions, that petitioner Barrow knew of the interstate aspects of the operation and conspired to violate the federal statute readily appears from the evidence. He was a central figure in the operation. He settled disputes, gathered up the money after the game, hired employees and resolved questions as to which customers should be admitted. Indeed, on one occasion, he admitted a New Jersey customer only after the applicant had exhibited his New Jersey driver's license and mentioned the names of some of the New Jersey operatives (G. App. 231b–232b). Moreover, since Barrow was constantly present, he could hardly have failed to hear the doorman periodically announce the departure of the "luggers" automobiles for New Jersey. As the trial court concluded in the opinion on the post-trial motions, "[i]t would be almost impossible to conclude that Barrow had no knowledge of the travel by employees of the game from New Jersey to Reading, Pennsylvania" (A. App. 514a).

The government was not required to prove that petitioners had actual knowledge of the federal statute. Ignorance of the law is no defense to crime under this kind of statute. See *Ingram* v. *United States*, 360 U.S. 672, 678; *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68; *Yarborough* v. *United States*, 230 F. 2d 56, 61 (C.A. 4), certiorari denied,

351 U.S. 969; *Hemans* v. *United States,* 163 F. 2d 228, 240 (C.A. 6), certiorari denied, 332 U.S. 801; compare *Lambert* v. *California,* 355 U.S. 225, 228. The record does not support petitioners' suggestion (Pet. 10, 19) that the interstate travel was terminated as soon as the defendants learned of the federal statute. On the contrary, it indicates that there were efforts to conceal the interstate nature of the operation, as when New Jersey players were told to park their cars away from the game and not in the usual adjacent parking area (A. App. 290a, 364a, 392a).

2. Petitioners' further contentions that, if the instant conduct is deemed within the statute, it is unconsitutionally vague and impermissibly invades the States' power to punish local crimes (Pet. 3, 16–18) are without substance. Certainly the statute is not vague as applied since, as we pointed out above, its precise language exactly tracks the travel, intent and eventual facilitation involved here. Likewise, we think it clear that Congress had the power, under the Commerce Clause, to enact such legislation. See cases cited *supra,* p. 6. The statute involved is designed to prevent interstate travel to facilitate illegal gambling, as well as prostitution, narcotics and the illegal distribution of liquor. What this Court said in *Brooks* v. *United States,* 267 U.S. 432, 436–437, in upholding the act prohibiting the interstate transportation of stolen vehicles (18 U.S.C. 2312), is applicable here:

> The objection to the Act can not be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to

> promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.

See also, *Hoke* v. *United States,* 227 U.S. 308; *Champion* v. *Ames,* 188 U.S. 321; *Caminetti* v. *United States,* 242 U.S. 470. Nor does it matter whether the gambling enterprise is, in most respects, a purely local operation.[5] See *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 252–258. The statute does not prevent anyone from travelling interstate; it merely prohibits such travel for the specific purpose of facilitating an illegal gambling operation.

3. On January 20, 1962, FBI agents entered the premises occupied by the gambling operation to execute five arrest warrants (G. App. 105b–108b). At the time, there were some 115 players and employees on the premises. Shortly thereafter, a search warrant issued and agents seized three dice tables, three spotter stands, 88 pairs of dice, $31,609.75 in currency, two loaded pistols, ammunition and miscellaneous gambling paraphernalia and records (G. App. 73b–74b). The trial court suppressed the property seized on the ground that the agents failed to announce their purpose before breaking the innermost (third) door in order to serve the arrest warrants (A. App. 68a, 76a–

[5] We do not suggest, however, that the instant gambling operation was "purely local." It not only involved numerous interstate travelling employees but also a significant out-of-State clientele.

87a). See *United States* v. *Barrow*, 212 F. Supp. 837, 842–846.

Petitioners' argument (Pet. 21–25) that testimony of certain witnesses should have been suppressed as the fruit of the entry is without merit.[6] They argue, in effect, that witnesses present at the game on the night of the raid should be barred from testifying even though the FBI knew their identity and value as witnesses in this case prior to the illegal entry. It is, however, established that evidence acquired by means independent of any illegality or so remote from the illegality that the taint may be said to have been dissipated may be used at trial. *Wong Sun* v. *United States*, 371 U.S. 471; *Costello* v. *United States*, 365 U.S. 265.

Such was the case here. FBI agents had the gambling establishment under surveillance for weeks prior to the raid, taking pictures of persons entering and leaving, noting license numbers and otherwise discovering and identifying the employees and cus-

[6] Petitioners also object to the admission of an FBI agent's testimony concerning an interview with one of the defendants (Grassi) on February 1, 1962 as a product of the illegal entry (Pet. 24–25). This is without merit. During the several weeks of surveillance, FBI agents became aware that a former confidential informant in other matters was in regular attendance in the dice game as a player (A. App. 217a–219a). Several days after the raid, this source supplied defendant Grassi's nickname ("Snorky") (A. App. 213a–215a), which was traced through the nickname file of the Camden, New Jersey Police Department (A. App. 209a–210a), resulting in the interview. It is clear, therefore, that the interview did not flow from any illegality. Moreover, Grassi's statements were admitted at trial only as to his guilt (A. App. 222a–224a) and in no way implicated petitioners in any criminal activity (A. App. 223a; G. App. 210b).

tomers of the game. None of the witnesses complained of here testified directly concerning the raid but generally testified to persons seen and events occurring on their prior visits to the premises. Their identification and value as prospective witnesses were established independently of the raid which was held to have been conducted illegally.[7] Contrary to petitioners' assertion (Pet. 22–25), the fact that at least one of these witnesses stated, but for the raid, he would not have been willing to testify is not relevant. A witness may not, apart from his privilege against self-incrimination, decline to testify concerning his knowledge of a crime. *Blair* v. *United States,* 250 U.S. 273, 279–282. The instant case in

[7] Witness Smith was observed (and photographed) entering and leaving the gambling establishment numerous times in the two weeks preceding the January 20 raid. His automobile license number was recorded and traced before the raid. On the night of the raid, he was asked his name and released without questioning (A. App. 444a–454a). The raid contributed nothing to his identification or testimony (A. App. 451a–468a).

Witness Goetz also was observed and identified by FBI agents long before January 20 (A. App. 401a–406a). The *voir dire* (A. App. 435a–443a) showed that during the raid the witness identified himself, answered a few questions unconnected with his trial testimony and was permitted to leave. His testimony at trial concerned only events preceding the raid (A. App. 406a–433a, 443a).

The two remaining witnesses complained of, La Battaglia and Thomas, were both photographed (though not identified by name) prior to the raid (A. App. 334a–335a, 340a, 342a). They were detained by FBI agents as material witnesses as they left the outer door of the premises just preceding the raid and prior to the illegal breaking of the third (inner) door without announcement of purpose (A. App. 334a, 337a–339a, 342a, 398a–399a). Their testimony dealt exclusively with events preceding the raid (A. App. 344a–371a, 388a–396a, 398a–399a).

no way involves the question discussed in *Costello* v. *United States*, 365 U.S. 265, 278–280, of whether to exclude the testimony of a witness motivated to testify by knowledge of illegally obtained information in the hands of the police.

4. There is no merit to petitioners' contention that the trial court erred in refusing to grant a severance before or during trial (Pet. 25–27).[8] Petitioners were all participants in one closely integrated operation. In such circumstances separate trials of co-conspirators are required only where an affirmative showing of prejudice is made. *Opper* v. *United States*, 348 U.S. 84; Rule 14, Fed. R. Crim. P. Evidence introduced for a limited purpose or received only against one of several defendants is not in itself prejudicial to other defendants where, as here, the jury is adequately instructed by the court concerning the limitations. *Delli Paoli* v. *United States*, 352 U.S. 232; *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Caron*, 266 F. 2d 49 (C.A. 2); *Costello* v. *United States*, 255 F. 2d 389 (C.A. 8), certiorari denied, 358 U.S. 830. Petitioners concede, as they must, that the trial judge properly and frequently instructed the jury concerning evidentiary limitations and accorded petitioners every procedural protection possible (Pet. 26). The two statements petitioners point to as being particularly prejudicial (Pet. 26)—one concerning defendant Marzilli's reference to the termination of his participation in the operation because the "new law [was]

[8] A severance was granted prior to trial to one defendant (Comito), who was charged only with conspiracy.

being pushed by Bobby Kennedy" (A. App. 107a) and the other a post-conspiracy admission of defendant Grassi about his travel to Pennsylvania for the game (A. App. 223a; G. App. 210b)—hardly justify separate trials or warrant the assumption that the jury disregarded its instructions. Compare *Blumenthal* v. *United States*, 332 U.S. 539. The jury demonstrated its conscientious effort and ability to evaluate the evidence as to each defendant on each separate count when it acquitted one defendant on all counts and other defendants on some counts.

5. Petitioners' contention that the trial court gave the government too wide latitude in examining two hostile, evasive and reluctant witnesses (Pet. 28–30) is without merit. During the course of direct examination of Charles Wacks and Joseph DiGaetano (A. App. 126a–182a; G. App. 126b–208b, 218b–229b; Trial Tr. 1340–1465),[9] it became apparent that both witnesses were reluctant and evasive concerning the defendants' respective roles in the operation of the dice game and their identity. Wacks, in particular, demonstrated a deliberate refusal to testify to facts within his present knowledge (G. App. 174b–178b), a situation which almost prompted the court to hold him in contempt (G. App. 209b). Under these circumstances, the trial court permitted the government to show the witness his prior grand jury testimony (without reading it aloud before the jury) for the purpose of refreshing his recollection. In most in-

[9] The government is lodging with the Clerk of this Court the volume of the trial transcript containing the direct examination of DiGaetano.

stances, the witness then testified to his present recollection as refreshed (A. App. 129a–131a, 134a–136a, 160a–161a; Trial Tr. 1383, 1396, 1402–1407, 1416–1422, 1429–1430, 1433, 1439–1440, 1442–1454, 1456–1457, 1464). On a few occasions, the witness stated his recollection was not refreshed and the government was allowed to read excerpts of the grand jury testimony in cross-examination on a plea of surprise. When the witness said he had no present recollection but that the statements were true when made, such statements were admitted into evidence as past recollection recorded (A. App. 152a–155a, 161a–164a, 172a–177a; Trial Tr. 1422–1426a, 1434–1437). The two instances of admission of past recollection recorded of DiGaetano, cited by petitioners (Pet. 29), in no way implicated or concerned them. Prior grand jury testimony which neither refreshed the witness' recollection nor was adopted by him as true was not admitted into evidence (A. App. 177a, 181a).

The latitude of examination permitted by the court was well within its discretionary power. Even absent the evasive behavior of the witnesses, which justified cross-examination on a claim of surprise, it would have been proper to show them their grand jury testimony to refresh their present recollection. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States* v. *Bertucci*, 333 F. 2d 292 (C.A. 3), certiorari denied, 379 U.S. 839. Only in a few instances where the witness affirmed in court that his earlier statements were true when made were such statements admitted into evidence as past recollection recorded. This was in accord with settled law. *United States*

v. *Kelly*, 349 F. 2d 720, 770–771 (C.A. 2), certiorari denied, 384 U.S. 947, and cases cited; *Tatum* v. *United States*, 249 F. 2d 129 (C.A.D.C.), certiorari denied, 356 U.S. 943; *Papalia* v. *United States*, 243 F. 2d 437, 441 (C.A. 5); *United States* v. *Riccardi*, 174 F. 2d 883, 886–888 (C.A. 3), certiorari denied, 337 U.S. 941; 3 Wigmore, *Evidence* §§ 747, 754–755 (3d ed., 1940); 2 Underhill, *Criminal Evidence* § 500 (5th ed., 1956); 3 Wharton, *Criminal Evidence* § 852 (12th ed., 1955 and 1966 Supp.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Solicitor General.
BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

NOVEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966